No. 11584

In the United States Circuit Court of Appeals for the Ninth Circuit

MITSUKIYO YOSHIMURA, APPELLANT

v.

JAMES M. ALSUP, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF HAWAII, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR THE APPELLEE

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CITATIONS

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OPINION BELOW

The District Court filed no opinion on rendering the judgment appealed from.

JURISDICTION

This is an appeal from the judgment of the District Court entered on January 16, 1947 (R. 32–33), granting the Collector's motion to dismiss the taxpayer's complaint at the conclusion of the taxpayer's

[1] The action was originally commenced against Fred H. Kanne, Collector of Internal Revenue; upon his death, the action was continued against his successor, Henry Robinson, Acting Collector, for whom was substituted the present appellee upon his appointment as Collector.

presentation of his evidence in this case. The complaint prayed that certain assessments of income tax deficiencies and penalties for the years 1941, 1942 and 1943 totalling $9,487.51 be vacated and that the Collector be permanently enjoined from collecting those taxes. (R. 10.) The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended. (R. 4.) Notice of appeal to this Court was filed on January 17, 1947. (R. 33–34.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Has the District Court jurisdiction of a suit to enjoin the collection of internal revenue taxes, despite the provisions of Section 3653 of the Internal Revenue Code, which prohibits the maintenance of such a suit?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) *Tax.*—Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 3653.)

STATEMENT

The complaint (R. 4–10) alleges the following:

In the latter part of 1944 or early in 1945 an in-

vestigator of the Bureau of Internal Revenue visited the business premises of the taxpayer at Waiau, Territory of Hawaii, and demanded that he be permitted to examine the taxpayer's books. After examining his books, the investigator informed the taxpayer that he had defrauded the United States Government of thousands of dollars in taxes and that if the taxpayer did not sign a statement admitting this fraud, the taxpayer, a subject of an enemy country, would be in a very precarious position and would possibly be interned. As taxpayer had little education and had never fully mastered the English language he did not understand the meaning of the word fraud, and because Japanese alien residents of Hawaii at that time were being interned and imprisoned in large numbers for unexplained reasons by a military government the taxpayer feared he would be interned. So he signed the statement. The statement was not signed of his own free will but because of his fear of being interned. (R. 5–7.)

During the latter part of 1945 or early in 1946, investigators from the Bureau of Internal Revenue visited the taxpayer and requested that he sign three forms called "Form 870", a copy of which is attached to the complaint and marked Exhibit A, waiving any and all restrictions upon the assessment and collection of deficiencies in his income taxes for the years 1941, 1942 and 1943. (R. 7.)

The taxpayer told these investigators that he had consulted an attorney regarding his income tax matters and that, as he had been advised not to sign any papers without his attorney's approval, he wanted to see his attorney before signing any papers. The

investigators told the taxpayer that an attorney was not necessary and that since he had signed a statement admitting fraud, he was in a very dangerous position and they cited examples of federal income tax evaders who had been imprisoned. Under these circumstances the taxpayer signed the waivers. (R. 7–8.)

Immediately after signing these waivers the taxpayer consulted his attorney who went to the office of the Internal Revenue Agent and requested that the waiver forms be returned. The attorney was informed that the waivers had been mailed to Washington. The taxpayer's attorney wrote to the Bureau of Internal Revenue at Washington requesting consideration of the matter but this request was refused. (R. 8–9.)

As a result of signing the waivers, the taxpayer received from the Collector a tax bill for deficiencies and penalties amounting to $9,487.51, for which immediate payment was demanded. (R. 9.)

The taxpayer has not this amount in cash and if the Collector is permitted to seize and sell his properties the taxpayer will be irreparably damaged as he has no plain, adequate or complete remedy at law. (R. 9–10.)

Upon these allegations the taxpayer prayed that the assessments be vacated; that the Collector be permanently enjoined from collecting the taxes assessed and that he be granted such other relief as might be just and equitable. (R. 10.)

The Collector filed a motion to dismiss (R. 14–15) upon the grounds (1) that the court was without

jurisdiction of the subject matter of the suit and (2) that the complaint failed to state a claim.

This motion to dismiss was denied.[2]

The Collector then filed an answer generally denying the allegations of the complaint and alleging as defenses the grounds previously urged for dismissal. (R. 18–30.)

The issues raised by the complaint and answer were tried by the District Court which, at the conclusion of the taxpayer's case, dismissed the complaint upon the ground that the taxpayer had failed to make out a case within any exception to the prohibition against suits to enjoin taxes found in Section 3653 of the Internal Revenue Code. (R. 39, 178.)

SUMMARY OF ARGUMENT

Section 3653 of the Internal Revenue Code prohibits the maintenance in any court of any suit to enjoin the collection of taxes. Congress has provided a complete system of corrective justice under the revenue laws, based upon the idea of appeals within the executive departments. If a party aggrieved does not obtain satisfaction in this manner, suit may then be brought, but only after payment of the tax.

The complaint fails to allege and the taxpayer failed to prove any special and extraordinary circumstances to bring this case within any exception to the prohibition. The taxpayer here is resisting payment of taxes solely upon the ground that he does not

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[2] The record contains no copy of an order denying this motion. The statement that it was denied appears in the order sustaining the motion to dismiss. (R. 36–37.)

owe them. He does not contend that the law under which they were assessed is unconstitutional or that he could by no legal possibility be subject to a tax under it.

ARGUMENT

The District Court correctly held that it was without jurisdiction to entertain the suit

Section 3653 of the Internal Revenue Code, *supra,* prohibits the maintenance in any court of any suit for the purpose of restraining the assessment and collection of any federal tax.[3] *Graham* v. *duPont,* 262 U. S. 234; *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Osborn,* 240 U. S. 118; *Snyder* v. *Marks,* 109 U. S. 189; *Cheatham* v. *United States,* 92 U. S. 85; *State Railroad Tax Cases,* 92 U. S. 575. In *State Railroad Tax Cases, supra,* it is pointed out (pp. 613–614) that the Government has provided a complete system of corrective justice covering internal revenue taxes, founded upon the idea of appeals within the executive departments. If satisfaction is not obtained through that means, suit will lie against the collecting officer but only unless the tax is paid.

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[3] Insofar as income taxes are concerned, the only statutory exception to the prohibition of Section 3653, *supra*, is contained in Section 272 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 272). The taxpayer, in his brief in this Court, makes no contention that this statutory exception applies to this case, but places sole reliance upon the so-called judicial exception to the application of Section 3653. Moreover, not only had the taxpayer waived, as provided in Section 272 (d) of the Code, the restrictions provided in Section 272 (a) on assessment and collection of the deficiency, but the complaint filed in this case contains no allegation that the Commissioner had not sent a notice of deficiency to the taxpayer in accordance with the provisions of Section 272 (a).

Exception to the prohibition of the statute has been made in those rare cases where the taxpayer shows, in addition to the illegality of the exaction in the guise of a tax, exceptional and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence. *Dodge* v. *Brady,* 240 U. S. 122, 126; *Miller* v. *Nut Margarine Co.,* 284 U. S. 498; *Allen* v. *Regents,* 304 U. S. 439; *Burke* v. *Mingori,* 128 F. 2d 996 (C. C. A. 10th); *Sturgeon* v. *Schuster,* 158 F. 2d 811 (C. C. A. 10th).

In *Miller* v. *Nut Margarine Co., supra,* the scope of the exception was stated by the Court as follows (p. 510):

> This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force. *LeRoy* v. *East Saginaw Ry. Co.,* 18 Mich. 233, 238–239. *Kissinger* v. *Bean,* Fed. Cas. 7853. * * *

The District Court was of the opinion that while the taxpayer's proof, if viewed in the most favorable light might make out a case of exceptional and extraordinary circumstances, the taxpayer's liability for the tax was at least arguable and he had not brought himself within the exception. (R. 39.)

The basis of the taxpayer's complaint is that he signed waivers of the restrictions upon assessment of the income taxes here in question under the compulsion of threats made to him by revenue agents.

(R. 6–7.) In his testimony the taxpayer sought to expand the allegations of his complaint with the claim that he was not informed and that he did not understand what he was signing at all. (R. 132.) The record does not support the taxpayer's claim that he was unfamiliar with the English language and was ignorant of what he was doing as throughout the record shows the taxpayer's ready understanding of all interrogatories propounded to him and Exhibit C (R. 90) shows that he wrote an excellent hand. The complaint makes no claim that the taxpayer did not understand what he was signing; it goes no further than to allege that the pressure of the revenue agents induced the taxpayer to sign these waivers (and they are described as waivers in the complaint) without the benefit of counsel. Cf. *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295, 303.

The taxpayer's testimony is that he immediately after signing the waivers consulted his lawyer. (R. 132.)

The taxpayer's lawyer, who was his counsel in the District Court and is his counsel here, wrote to Washington regarding the waivers. (R. 149.) His letter does not appear in the record although a copy of it was submitted to the court and was offered. (R. 149.)

It is clear, however, from the reply of the Deputy Commissioner of Internal Revenue (Pltf. Ex. E, R. 151) that the taxpayer did not immediately consult his attorney as the attorney's letter was dated April 29, 1946, while the Bureau of Internal Revenue on March 26, 1946, had advised the taxpayer that assessment would be made immediately in accordance with the agreement, i. e., the waiver. It is also clear from

the Deputy Commissioner's letter that the taxpayer's attorney did not assert that the waivers were procured from the taxpayer by coercion—he simply stated that the taxpayer did not understand the agreement signed by him and that he did not owe the tax in question.

The taxpayer's attorney characterized the letter himself as a request to the Commissioner to open the whole case. (R. 150.)

The allegations and the proof fail to show that a valid tax could by no legal possibility be asserted against the taxpayer (*Miller* v. *Nut Margarine Co.*); they simply tend to show that the taxpayer does not owe the tax. That such a case is not within the exception to Section 3653 of the Internal Revenue Code was recently held in *Burke* v. *Mingori, supra,* where the court, on reversing a judgment granting a permanent injunction, said (p. 997):

> Neither are extraordinary circumstances present. It is a case of complainants resisting a tax which they contend they do not owe. Investigators of the Alcohol Tax Unit made an investigation into the question whether complainants had been interested with others in the manufacture of distilled spirits, and the assessment was based upon information obtained in that manner. In other words, the Commissioner determined that they had been interested in the manufacture of such spirits. They deny any such interest and therefore assert that they are not liable for the tax. It may be that they did not have the interest and hence are not liable for the tax. But that issue of fact is subject to judicial determination only in a suit for refund. It cannot be ad-

> judicated in an action to enjoin the Collector from collecting the tax. * * *

The District Court stated (R. 38) that the taxpayer's evidence was "not too clear or satisfying" but even if the allegations of the complaint and the taxpayer's brief are to be indulged with every favorable inference the only injury sustained by the taxpayer has been the loss of his right to appeal to the Tax Court (R. 10).

Under the circumstances, if the taxpayer had refused to sign waivers of the restriction upon assessment and collection after having previously signed a statement admitting cheating the Government in regard to income taxes (R. 127), the Commissioner clearly would have been justified in making a jeopardy assessment against him under Section 273 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 273). If this had been done, it is true that the taxpayer still would have had his right of appeal to the Tax Court but collection of the assessment could only have been stayed by his giving adequate security for payment of the whole amount. If the judgment of the District Court is affirmed and the security which the taxpayer has given to stay collection (R. 163–165) is applied to the payment of the assessments, the ordinary mode of obtaining a refund of the taxes thus paid is still open to the taxpayer if he persists in his assertion that these taxes were erroneously and illegally assessed and collected. He is thus actually in no worse position now than if a jeopardy assessment had been made.

CONCLUSION

The judgment of the District Court is right and should be affirmed.

Respectfully submitted.

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